UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NORTHWEST GRAPHICS, INC.

and **Case 14-CA-27011**

LOCAL 6-505M, GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, AFL-CIO

Sharon Steckler, Esq., for the General Counsel
Ralph Bruns, for the Charging Party
Lawrence Kaplan, *Esq., Kaplan Associates, L.L.C., St. Louis, MO,* for Respondent

DECISION

Statement of the Case

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in St. Louis, Missouri on October 18, 2002.[1] The second amended complaint, which issued on October 2, was based upon unfair labor practice charges and amended charges filed on July 8, August 22, September 13, and September 27, by Local 6-505M, Graphic Communications International Union, AFL-CIO (union) against Northwest Graphics, Inc. (Respondent).

It is alleged that on four occasions between May and August, Respondent unilaterally implemented and then discontinued an evening shift, dealt directly with employees in assigning them to that shift, and then paid those employees a shift differential. It is further alleged that in September, Respondent dealt directly with an employee who was working on the day shift and unilaterally changed that employees' hours. These acts are alleged to have occurred at a time when the parties were engaged in negotiations for an initial collective bargaining agreement.

Procedural Matters

A. Amendment of the complaint

The complaint originally alleged Respondent engaged in unlawful conduct in June, July, and August. At the hearing, counsel for the General Counsel moved to amend the complaint to add additional allegations of direct dealing with employees on May 8, and unilaterally implementing the evening shift on May 9. Counsel for Respondent objected to the amendment on the ground that he did not have previous notice and did not have sufficient time to address the new allegations. I overruled the objection and allowed the amendment. The subject matter of the amendment was closely related to the allegations of the complaint. Moreover, I advised counsel

[1] All dates are in 2002 unless otherwise indicated.

for Respondent that I would grant a request for an adjournment in order to give him sufficient time to prepare a defense to the new allegation. At the close of the hearing, I reminded counsel for Respondent that he could request an adjournment, but he declined. Given these circumstances, I adhere to my ruling allowing the amendment. *Folsom Ready Mix, Inc.,* 338 NLRB No. 181, slip op. at p. 1, fn. 1 (2003).

B. Respondent's first affirmative defense

In its answer, Respondent raised, as an affirmative defense, that counsel for the General Counsel displayed overt prejudice toward Respondent in the course of the proceedings leading up to this hearing, and in other proceedings involving Respondent. Respondent averred this case was therefore tainted and should be dismissed. Counsel for the General Counsel filed a motion to strike this affirmative defense and Respondent filed a response in opposition. I reserved decision on the motion until the close of the case. No evidence was adduced at the hearing in support of this affirmative defense and the motion to strike is therefore granted.

C. Filing of briefs

The date for the filing of briefs was November 22. Respondent filed a certificate of service stating that its brief was deposited with Federal Express on November 22, and a copy of the brief was faxed that same day to the Division of Judges. Citing Rules and Regulations Section 102.111, Counsel for the General Counsel filed a motion to reject the Respondent's brief on the ground that it was untimely filed. Respondent contends that the brief was timely filed under the provisions of Section 102.112.

Section 102.112 governs the service of documents, and specifically references the provisions of Section 102.111 for filing requirements. Section 102.111(b) requires that in order to be timely filed, a brief must be postmarked no later than the day before the due date. Postmarking includes the deposit of the document with a delivery service. Section 102.114(g) provides that facsimile transmission of a brief will not be accepted for filing.

Respondent's brief was untimely filed as it was not deposited with Federal Express until November 22, the date it was due, and Respondent's facsimile transmission that same day is not accepted. Counsel for the General Counsel's motion to reject Respondent's brief is granted, and the brief has not been considered.

D. Proceedings in Cases 14-CA-25998, 26121, 16156, and 26564

On December 10 and 11, 2001, a hearing was held before Administrative Law Judge Robert Pulcini in Cases 14-CA-25998, 14-CA-26121, 14-CA-26156, and 14-CA-26564, involving issues similar to those in this case. Judge Pulcini issued a decision on June 4, and exceptions to that decision are pending review before the Board. Judge Pulcini's findings are not binding authority in this case, *St. Vincent Medical Center,* 338 NLRB No. 130 (2003), and I have not considered them. The factual findings herein are based solely on the evidence adduced before me.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization Status

Respondent admits, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Respondent's business & collective bargaining history

Respondent is engaged in the business of printing medical journal reprints in St. Charles, Missouri. Timothy Roberts, vice-president, Jim Recker, production manager, and Bob Smith, plant manager, are admitted agents and supervisors within the meaning of the Act.

On June 28, 1999, the Union was certified as the exclusive bargaining representative in the following unit:

> All production and maintenance employees employed by Respondent at its 940 Harmsted Court, St. Charles, Missouri facility, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

Between the time of the union's certification and the hearing in this case, the parties conducted 22 bargaining sessions without reaching full agreement on the terms of an initial contract.[2] The principal negotiators for Respondent were Roberts and attorney Lawrence Kaplan. The principal negotiators for the union were Ralph Bruns, vice-president and business representative, and Joe Napoli, a member of the employee negotiating committee. Bruns prepared bargaining notes during these sessions, and his notes for the four sessions held immediately prior to this hearing were introduced in evidence, specifically the sessions held on February 21, May 21, July 10, and October 10.

B. Past practice re: evening shift

Napoli has worked for Respondent for 13 years as a stripper, press operator, and bindery worker. Napoli testified that 10 or 11 years ago, the company implemented an evening shift that lasted only for a few months. In about 1997, the company again instituted an evening shift and the hours were from 3:30 p.m. to midnight. The shift was operated on a permanent basis from 1997 until shortly after the union was certified when it was discontinued.[3]

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[2] The dates of these sessions were: August 11, September 29, October 27, December 2, 1999; January 6, January 20, February 3, February 22, March 23, May 9, May 23, August 10, September 28, October 24, December 6, 2000; January 26, July 11, October 31, 2001; February 21, May 21, July 10, October 10, 2002.

[3] The discontinuation of the evening shift shortly after the union was certified is not alleged in this case to have been unlawful, but was an issue before Judge Pulcini.

C. November 1, 2001 draft agreement

On October 31, 2001, the parties held their eighteenth bargaining session. During the session, attorney Kaplan announced the parties were at impasse. Bruns immediately objected and indicated he believed there was ongoing movement in their discussions.

On November 1, 2001, the parties tentatively agreed to many of the terms contained in a seventeen-page draft agreement.[4] With respect to the evening shift, the parties tentatively agreed, in section 6.2, that "[t]he premium for the first night shift shall be fifty cents (50 cents) per hour and shall be added to and become part of the employee's regular hourly wage." They further agreed, in section 6.6, that, "[i]n the event of a shift change employees will be given five (5) working days advance notice of same."

Six issues remained outstanding as of November 1, 2001: wages, overtime rates for Sundays and holidays, retirement benefits, performance of unit work by supervisors, union security, and dues checkoff. With respect to wages, the union proposed a wage scale providing for increases at six-month intervals up to a maximum amount. Respondent demanded the flexibility to pay wages within a prescribed range.

The nineteenth bargaining session was held on February 21. The parties' reiterated that the November 1, 2001 draft agreement was the working document for negotiations, and they reviewed the six open issues. A mediator from the Federal Mediation and Conciliation Service was present, and the discussions that day centered on pension, retirement and profit sharing issues. According to Bruns' notes, the union proposed an employer contribution of 4.75 percent of straight-time wages to the union's pension plan. Kaplan stated the company did not want to make any future commitments to employees' retirement, and countered that the company's proposal of a 2.6 percent contribution to a profit-sharing plan was appropriate. Bruns indicated that the 2.6 percent figure was agreeable to the union if all employees were considered vested. The parties agreed to meet again.

D. May 9 implementation of evening shift

By letter dated May 7, Roberts advised Bruns as follows:

> Due to an increase in business, we will be starting a 2nd shift operation. We have just hired the first individual to operate our MOZP [printing press]. If you have any questions or require more information, please contact me.
>
> Joe Jones will start on 5/8/02 pending his physical and drug screen. His rate of pay will be $16.00 per hour; it will increase to $16.50 per hour when he begins to work on the 2nd shift (1:15 pm – 9:45 pm). After 3 months of service, Joe will receive an evaluation and upon a favorable evaluation, his pay will increase to $17.50 per hour.
>
> We intend to hire one more person for the 2nd shift and change one current employee's hours so we will have a total of 3 people on this shift. We will consider volunteers from current employees wanting to change to the 2nd shift,

[4] Several draft agreements were introduced. The draft agreement referred to in this decision is General Counsel Exh. 28, denoted "Employer Proposal 11/1/01."

> however, we will decide who will make this change based on the best interest of the company.

Roberts hired Joe Jones on May 7. Jones worked the day shift on May 8. On May 9, he worked the evening shift and was paid a 50-cent per hour differential. On May 10, he returned to the day shift.

E. May 21 bargaining session

The twentieth bargaining session was held on May 21, again in the offices of the FMCS mediator. According to Bruns and Napoli, three topics were discussed: the May 9 implementation of the evening shift, wages, and a pending request for information made by the union.

On the subject of the May 9 implementation of the evening shift, Bruns stated that he would not file an unfair labor practice charge in this particular instance, but he was not waiving the union's right to bargain about this issue in the future. Roberts responded that the workload was cyclical, and that as of that day (May 21), the company did not have a need for further implementation of the evening shift. On the subject of wages, the union proposed an increase to the wage scale it had previously proposed, citing the three-year passage of time since the first proposal was made as justification for the requested increase. The union also indicated it was still waiting for a response to a previously made request for information about pensions. The union asked the mediator to schedule a joint meeting at a future date.

F. June 18 implementation of evening shift

On or before June 17, Smith and Recker spoke directly with employee Shayne Shelburne about working an evening shift and paying him a shift differential of $0.50 per hour.

On Monday, June 17, at 3:27 p.m., Roberts faxed the Union a letter that stated:

> The company is going through a busy time and in order to meet delivery requirements will be running a shift starting at 1:00 pm and ending at 9:00 pm. Joe Jones and Shayne Shelburne will be working this shift for a temporary period for what we believe to be not more than two weeks. They will be receiving a 50¢ an hour premium for working this shift.
>
> I would appreciate you contacting us in writing indicating your position because this occurs frequently throughout the year. We are available to meet to discuss this upon request; please contact Larry Kaplan.

Without further notification to the union, on Tuesday, June 18, Respondent implemented the 1:00 p.m. to 9:00 p.m. shift and Jones and Shelburne were assigned. At 2:36 p.m. that same day, Bruns faxed a letter to Roberts in which he stated, "the union requests to meet and negotiate before the company changes shifts or institutes a shift premium." Bruns further suggested the next bargaining session be held at the FMCS offices.

By letter dated June 19, Roberts responded to Bruns request to bargain:

> I received notification from one of our customers on Friday, 6/14/02 around 4:00 pm, that they had work for us that needed to be delivered on 6/21/02. This work encompassed approximately 56 hours of press time. Please refer to my letter

> dated 5/7/02 in which the hiring of Joe Jones was predicated upon him working this modified shift. After hiring Joe, work slowed down and we decided to have Joe stay with us working 8:00 am – 4:30 pm because we know from experience that we would need him to work these modified hours in the future.
>
> I am hoping that we can come to some resolution of this matter that will allow us to continue this practice without the union filing charges with the NLRB. We need the flexibility to begin and end these shifts and I believe the employees understand this and are agreeable to it. This service to our customers is crucial.
>
> Joe & Shayne have worked these modified hours on 6/18/02 and in all likelihood this will continue for one to two weeks. Please let Larry know when [the FMCS mediator] wants to meet so we can schedule a negotiation.

On June 27, at 9:23 a.m., Roberts faxed Bruns the following letter:

> We informed you in a previous letter dated 6/19/02 of our intent to meet and negotiate issues of an increase in pay for Tom Watkins and also the working hours for Shayne Shelburne and Joe Jones. We are renewing our request to meet and negotiate these issues.
>
> Joe and Shayne are currently scheduled to remain working from 1:00 pm to 9:30 pm as outlined in my letter dated 6/17/02. These modified hours will continue as long as we need Joe to operate the MOZP.
>
> Please contact Larry Kaplan to schedule a negotiation.

On July 2, Bruns faxed a reply to Roberts, stating in relevant part:

> In the union's June 18, 2002, letter in response to the company's letter dated June 17, 2002, the union requested to bargain before the company made any changes regarding shifts or shift premiums. The union renews its request that the company bargain before implementing changes. It is also our understanding that the company implemented a second shift and shift premiums on June 18, 2002, less than twenty-four (24) hours after notifying the union. This is unacceptable and the union will be filing charges with the National Labor Relations Board.
>
> The union suggests meeting at FMCS in the hopes that our meetings might be more productive, however, the union stands ready to meet with the company and their representatives at mutually agreeable date, place and times. The union has the following available dates, July 8, July 10 and July 12, 2002. Please notify the union of the company's availability.
>
> The company also indicates that they need this flexibility to begin and end shifts as needed. The union insists the company bargain before these changes take place on a case by case basis. The company's letter says the company unilaterally implemented the second shift on June 18, 2002, despite the union's request to bargain. The union objects to this change.

On July 8, Roberts wrote to Bruns:

> We informed you in a previous letter dated 6/17/02 of Joe Jones and Shayne

> Shelburne working hours being modified for production reasons. We are scheduled to meet to negotiate this issue on 7/10/02.
>
> Joe Jones has requested to take 7/11/02 and 7/12/02 off work. We are allowing Joe to take this time off, without pay. Shayne's hours will change to 8:00 am to 4:30 pm for these two days. Upon Joe returning to work on 7/15/02, he and Shayne will continue the hours of 1:00 pm to 9:30 pm.

The next day, July 9, Roberts again wrote to Bruns in relevant part:

> Due to a quick increase in business, Joe will not be taking off [July 11 and 12], therefore Joe & Shayne will continue their hours of 1:00 pm to 9:30 pm…This cooperative relationship between the employees and the company is necessary to maintain a high level of service to our customers. We will discuss this further at our negotiation scheduled for tomorrow.

G. July 10 bargaining session

The twenty-first bargaining session was held on July 10, again in the offices of the FMCS mediator. According to Bruns' notes, Kaplan began by stating the company did not want a "brouhaha" ever time they wanted to change something, and that the company believed that it was within its rights to start and end the evening shift. Roberts then presented a document entitled "Proposed Communication and Bargaining Methods." Roberts testified that there had been no concessions by either side in quite a while, and that the document was an attempt to lay out a method for the company to carry on its business in the interim until the parties were able to reach a signed agreement.

The first proposal dealt with shifts, and stated as follows:

> It is understood that Northwest Graphics (NW) must institute and discontinue shifts depending on workload. In this regard NW agrees:
> (a) A fifty-cent premium will be paid on all second shift hours. (It is considered unlikely that there will be a third shift and in that event the parties will negotiate rates, terms and conditions).
> (b) NW will ask for volunteers to work the second shift. In the event there are insufficient volunteers, NW will assign employees by reverse seniority provided they have had sufficient experience to do the work required.
> (c) NW will notify the [union] before a second shift is instituted unless it is an emergency and inform the [union] which employees will work the second shift.
> (d) NW will notify the [union] before a second shift is terminated.

Napoli testified that the language in subparagraph (b), that employees might be assigned to the evening shift in reverse seniority order, was a "brand new" proposal and had never been previously discussed.

The second proposal concerned new hires. Respondent proposed that it would notify the union before it hired new employees, except in the case of an emergency, and would give the union an opportunity to recommend an individual for a job. This proposal differed from the tentatively agreed-to provision in the November 1, 2001 draft agreement. Section 4.1 of that draft stated, "The Employer agrees to notify the Union of all vacancies filled. The Employer will hire workers on the basis of ability, qualifications and skill."

The third proposal concerned wage increases. Respondent stated that it would perform an annual employee review and would increase wages depending on the contribution, effort, and increase in skill and responsibility levels of each employee.

The fourth proposal dealt with bonuses. Respondent proposed that it would notify the union before granting bonuses and would give the union sufficient time to suggest alternatives to the proposed bonuses. There had been no reference to bonuses in the November 1, 2001 draft.

In the discussion that followed the presentation of these proposals, Roberts distributed a chart showing production statistics on the MOZP presses from January to June, and demonstrating the volatility of customer demands. The presentation of the documents and the resulting face-to-face discussion between the parties lasted approximately 30 minutes at which time Bruns and the members of his negotiating committee left the room to caucus with the assistance of the mediator. Approximately 35 minutes later, attorney Kaplan entered the room in which the union representatives were caucusing and asked if they were ready. When Bruns stated they were not yet ready to respond to the proposals, Kaplan became irate, shoved a piece of furniture against the wall, and indicated the meeting was over. Kaplan and Roberts left the building and the session ended.

In two letters, both dated July 16, Bruns reviewed the events of July 10 and advised Roberts "the union was not given the opportunity to ask questions with regard to the company proposal, much less make a counteroffer." Bruns requested numerous items of information with regard to the chart and the company's proposals, and he again reiterated the Union's position that the company negotiate before making changes. On July 24, Roberts responded to the information request. He also wrote, "[w]e have been meeting with the union for almost 3 years. The last 18 months have shown little or no movement from either party with respect to contractual issues."

On July 25, Respondent discontinued the evening shift that had been operated since June 18, and discontinued payment of the shift differential to the employees that had worked that shift. This was done without prior notification to the Union.

H. August 12 implementation of evening shift

On August 12, Respondent implemented the evening shift, with an accompanying $.50 wage differential, without prior notification to the Union. Again, Jones and Shelburne were assigned. The evening shift has operated continuously since August 12, and was ongoing at the time of the hearing.

In a letter dated August 29, Bruns wrote that it had come to his attention that Respondent had again implemented the evening shift and shift differential. He advised Roberts that the union objected to these changes and he requested Respondent bargain before making such changes.

I. Change in the day shift hours

1. Past practice

Employees on the day shift have traditionally started work at either 5:00 a.m., 7:00 a.m. or 8:00 a.m. Roberts testified that since 1991, the company has had a practice of accommodating employee requests for adjustments to their work hours if the requests did not

affect production needs. He explained:

> A: If an employee comes up with a change in work schedule, if we can accommodate them inside the constraints of our production environment, then we do it. If --
> Q: Okay. Is that what you did from ’91 to ’99 until the Union was certified?
> A: Yes, sir.
> Q: Has that changed from ’99 to present?
> A: No, it has not changed.65

By way of example, Roberts testified that one employee, Rena Buford, requests schedule accommodations on a regular basis, two or three times every month. The day before the hearing, Roberts granted Buford’s request to start work at 6:30 a.m. so she could make her carpool. Napoli was not asked about Respondent’s practice of accommodating individual employee requests for changes in start times, and Bruns admitted he did not know if the company had such a past practice.

2. Change in hours for employee Boudreaux

On Friday, September 13, employee Mark Boudreaux asked Roberts to change his starting time from 5:00 a.m. to 6:30 a.m. so that he could take his child to daycare. Roberts granted Boudreaux’s request effective 6:30 a.m. on Monday, September 16. At 11:49 a.m. on September 16, Roberts faxed a copy of Boudreaux’s request to Bruns and advised him that the request had been granted.

On September 19, Bruns notified Respondent by letter that the change in Boudreaux’s hours constituted direct dealing and that Respondent had not provided the union with an opportunity to bargain about the change. The union objected and requested Respondent bargain over these, and any other changes, prior to their implementation.

J. October 10 bargaining session

The twenty-second bargaining session, and the last session held before this hearing, was on October 10. Respondent adhered to its position that it had the right to institute and eliminate the evening shift as customer demands dictated. The union proposed that the previously tentatively agreed-to shift differential of $.50 per hour be increased to $1.50 per hour.

The parties discussed the change in hours granted to employee Boudreaux. Bruns complained that the union had not been given the opportunity to bargain about this change. Kaplan countered that the company would accommodate employees’ requests for changes in their hours as the long as their work could be completed. Kaplan commented that both the union and the company had shown flexibility in their discussions.

The parties discussed the existing practice for employee performance appraisals and how wage increases were tied to those appraisals.

The parties discussed the management rights’ clause language that had been tentatively agreed to the draft agreement. Bruns said that the union would, in the future, be proposing new and different language for that clause.

According to Napoli, Bruns presented a spreadsheet showing recent wage increases for bargaining unit employees. Bruns said he would like to try to come to some agreement on this,

and Kaplan and Roberts said they could talk about a wage range. Bruns said he wanted to reach agreement on a wage scale and Roberts responded, “what makes you think that we can come to any kind of agreement since we haven’t been able to do it for the past three years?” Kaplan interrupted Roberts and said they could discuss the issue. The parties talked about a wage survey that had been conducted and the union representatives said they thought the figures needed to be updated. Kaplan and Roberts agreed that wages needed to be looked at again, and according to Bruns’ notes, Kaplan said the company would be proposing a new wage range for 2003. On the issues of union security and dues checkoff, Respondent adhered to its position that employees should not be required to join the union and should pay union dues on their own.

During the course of this session, attorney Kaplan stated he believed the parties were at impasse. Bruns disagreed, pointing out that the union was still examining proposals and requesting information. Kaplan insisted, however, that there had been no movement between the parties on any issue since October 2000. At the hearing, Kaplan questioned Bruns on this point:

> Q: Ralph, as you just testified, I asked you last week if the Union had made any concessions since this time, October 24th, 2000, on any of the Company's proposals and you said, no, is that correct?
> A: That is correct.
> Q: And I also ask you the converse question, whether the Company had made any concessions on the Union's proposal on any subject based on this -- from this document to the present and you said, no, is that correct?
> A: That is correct.

Bruns later testified that even though he made that statement to Kaplan on October 10, he no longer agreed with it:

> Q: Mr. Bruns, why are you not at impasse?
> A: We have offered proposals to the Company with outstanding information requests and at no time that I can recall has there not been charges pending against this Company.
> Q: On July 10th, 2002, at the negotiation, what opportunity were you given to respond to the Employer's new proposal?
> A: Virtually none.

According to Bruns’ notes, Bruns stated the union wanted to continue to discuss all open issues. At the close of the session, attorney Kaplan noted that this unfair labor practice hearing was scheduled to begin on October 18, and he said the parties needed to schedule time for negotiations after the trial.

At the hearing, Napoli was asked to summarize the issues that remained open after the October 10 session. He responded that the issue of a wage range versus a wage scale remained open, as well as retirement benefits, the implementation and hours of the evening shift, shift differentials, and union security. On cross-examination, he was asked if the open issues have changed since October 24, 2000. He pointed out the union’s wage demands changed when the union asked for an increase in the top end of the scale due to the passage of time.

IV. Analysis

A. The evening shift

1. Past practice

Respondent defends its implementation and discontinuation of the evening shift on the ground that it had an established past practice of operating that shift on an intermittent, as-needed basis, and that the continuation of that past practice from May to August 2002 was not a unilateral change. The evidence does not support Respondent's position.

Napoli was a believable witness, but his testimony regarding the operation of the second shift from 1999 to 2002 was vague and somewhat garbled. He was clear that from 1997 until shortly after the union was certified in June 1999, Respondent operated a permanent evening shift because he worked that shift for several years. He was also clear that sometime after the union was certified, the permanent shift was discontinued. Beyond that, his testimony was confusing, as reflected in the following exchange on cross examination:

> Q: Okay. And then after that stopped, after that permanent second shift stopped, did the Company institute and terminate second shifts as business required through the present?
> A: Yes, right after the – about the time of June of '99.
> Q: And to the present?
> A: To the present, yeah. It – after the Union was brought in June of '99, one stopped and then picked back up again.

I do not view Napoli's response to attorney Kaplan's questions as probative of the issue. Not only was his testimony confusing on this point, there is no foundation from which to conclude that Napoli was privy to Respondent's decision-making processes on this matter, or that he had knowledge of Respondent's business needs.

In Roberts' letter of May 7, he stated, "we will be starting a 2nd shift operation. We have just hired the first individual…" This language is more suggestive of the commencement of a new operation than the continuation of a past practice. There is no other evidence in this record regarding the operation of an evening shift during the period 1999 to 2002. I therefore conclude the evidence does not establish that Respondent had an established past practice of operating an evening shift on an intermittent basis.

2. Overall impasse

An employer violates the duty to bargain if, when negotiations are in progress, it unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within its pre-impasse proposals. Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. *Taft Broadcasting Co.,* 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C.Cir. 1968). For impasse to occur, neither party must be willing to compromise, *Huck Mfg. Co. v. NLRB,* 693 F.2d 1176,

1186 (5th Cir. 1982), and both parties must believe that they are at the end of their rope. *PRC Recording Co.,* 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). It is an issue of futility, and not of some lesser level of frustration, discouragement, or apparent gamesmanship. *Grinnell Fire Protection Systems Co.,* 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert denied 534 U.S. 818 (2001). Because impasse is only a temporary deadlock or hiatus, and any change in circumstance that creates a new possibility of fruitful discussion breaks an impasse, the analysis necessarily focuses on the status of negotiations at the time the unilateral change was made. *Jano Graphics, Inc.,* 339 NLRB No. 38 (2003). Impasse is a defense to the charge of unilateral change and must be proved by the party asserting the defense, *North Star Steel Co.,* 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992), which in this instance is Respondent.

The evidence in this case begins with the eighteenth bargaining session held on October 31, 2001, two years and two months after the commencement of bargaining. At this session, attorney Kaplan declared the parties were at impasse. I credit Bruns' uncontradicted testimony that he immediately objected to the characterization, and stated he believed progress was being made. Bruns' testimony is fully supported by the fact that the very next day, the parties agreed to many of the terms contained in a seventeen-page draft agreement.

After November 1, 2001, six issues remained open: wages, overtime rates for Sundays and holidays, retirement benefits, performance of unit work by supervisors, union security, and dues checkoff. At the nineteenth bargaining session held on February 21, attorney Kaplan stated the company would not agree to participate in the union's pension program, and that the company's previous proposal of a 2.6 contribution to a profit-sharing plan was appropriate. In a significant concession, Bruns agreed to the 2.6 percent figure provided all employees were considered vested. This was the last bargaining session held before Respondent's May 9th implementation of the evening shift. Far from being at impasse, the parties had made significant progress in the two bargaining sessions immediately preceding the announcement. I therefore find that no overall impasse existed as of May 9.

The twentieth bargaining session was held on May 21. At this session, Roberts told the union that he did not anticipate a need for further implementation of the evening shift. The union increased its wage and argued that the passage of time justified the increase. Respondent did not reject the union's proposal out of hand, and the parties agreed to meet again with the union requesting that the FMCS mediator schedule the next date. As of the close of this session, the union was also waiting for Respondent to provide previously requested information. The parties were not at overall impasse at the close of this session on May 21 and they were not at overall impasse on June 18 when Respondent again implemented the evening shift.

Respondent's second implementation of the evening shift lasted from June 18 to July 25. In that period of time, on four separate occasions, Respondent stated its willingness to bargain over the evening shift issue. In his letter of June 19, Roberts wrote that he hoped to come to a resolution of evening shift issue and he asked Bruns to contact Kaplan to schedule the next bargaining session. In his letter of June 27, Roberts requested to meet and bargain over the working hours for the two employees working the evening shift and again asked Bruns to contact Kaplan to schedule a negotiation session. In his letter of July 8, Roberts told Bruns that they would discuss the hours of the two employees working the evening shift at the next scheduled session on July 10. Finally, in his letter of July 9, Roberts stated that they would be discussing the evening shift with the union at their bargaining session the next day.

On July 10, Roberts submitted a four-point written proposal regarding how he would like to operate the evening shift, and he also distributed production statistics in an effort to persuade

the union that the need to implement and discontinue the evening shift was driven by the volatility of customer demand. The union asked to meet privately with the mediator in order to review the statistics. Approximately 35 minutes later, the uncontradicted and credible evidence of Bruns shows that attorney Kaplan entered the room where the union was caucusing and demanded an immediate response. When Bruns indicated that he needed more time to respond, Kaplan became irate and he and Roberts walked out of the negotiation session. While Kaplan and Roberts may have felt they were at the end of their rope, Bruns and the members of the union negotiating team were clearly not at the end of theirs. They were actively studying the company's proposal and were stunned at Kaplan's abrupt and premature adjournment of the meeting. As Bruns later pointed out in his letter of July 16, the union was not given the opportunity to even ask questions about the evening shift proposal, much less make a counteroffer.

It should also be pointed out that earlier in the session on July 10, progress was demonstrated on other issues. Whereas Respondent had previously taken the position that it would notify the union of new hires only after the fact, on July 10, Respondent submitted a proposal stating that it would notify the union before it hired new employees and give the union an opportunity to recommend individuals for openings except in emergency situations. In addition, Respondent for the first time made a proposal regarding bonuses, indicating that it would agree to notify the union before granting bonuses and give the union an opportunity to suggest alternatives.

Given Respondent's repeated statements of willingness to bargain over the evening shift, its four-point proposal on the issue submitted at the July 10 bargaining session, the union's demonstrated willingness to study that proposal, and the progress made on the issues of new hires and bonuses, I find the parties were not at impasse as of the close of the bargaining session on July 10. In the days following that session, the union made an information request regarding the evening shift and that request was still outstanding as of July 25 when the company discontinued the evening shift. Given all these factors, I find the parties were not at overall impasse on July 25. There was no further change in the status of negotiations between July 25 and August 12 when Respondent implemented the evening shift for a third time. I therefore find the parties were not at overall impasse on August 12.

The relevant time frame for assessment of whether of not an impasse exists is at the time the alleged unilateral change is made, and I have concluded that there was no legally cognizable overall impasse on May 9, June 18, July 25, or on August 12, the dates of Respondent's implementation and discontinuation of the evening shift. As such, attorney Kaplan's declaration of impasse on October 10 is irrelevant. Even if the evidence established that the parties were at impasse on October 10, it is irrelevant consideration since the alleged unilateral changes had been made months before.

3. The issue of economic exigency

a. Applicable Law

When, as here, the parties are engaged in negotiations, the Board's rules regarding the obligation of an employer to refrain from making unilateral changes in terms and conditions of employment are well established. The general rule is that absent overall impasse, an employer must refrain from implementation of any unilateral change. The Board has, however, recognized two limited exceptions to the general rule: when the union engages in tactics designed to delay bargaining, and when economic exigencies compel prompt action. *Bottom Line Enterprises,* 302 NLRB 373 (1991). Since I have concluded there was no overall impasse, the economic

exigencies exceptions must be addressed.[5]

The Board has recognized two levels of economic exigency in this context. In the most severe circumstance, extraordinary events which are unforeseen and which have a major economic effect requiring immediate action may serve to entirely excuse an employer's obligation to bargain. In such a case, the employer has the heavy burden of demonstrating the existence of circumstances which required implementation at the time the action was taken, or an economic business emergency that required prompt action. There are, however, other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that may constitute exigent circumstances. In this second situation, an employer satisfies its obligation to bargain by providing the union with adequate notice and opportunity to bargain. In that event, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change. This second exception is limited only to those exigencies in which time is of the essence and which demand prompt action. The employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. In such time-sensitive circumstances, bargaining need not be protracted. *RBE Electronics of S.D., Inc.,* 320 NLRB 80, 81 (1995); *Bottom Line Enterprises,* 302 NLRB 373 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).

b. Existence of Emergency Circumstances

Respondent has failed to demonstrate the existence of an economic emergency of the kind that would have entirely excused its obligation to bargain. At the July 10 bargaining session, Roberts presented a graph showing the volatility of customer demand during the first six months of 2002. The graph shows dramatic fluctuations in the volume of Respondent's business throughout the six-month period, and supports Respondent's position, which it articulated repeatedly in negotiations, that it has an ongoing business need to utilize an evening shift when warranted by customer demand. The graph also clearly demonstrates that the peaks and valleys of customer are inherently characteristic of Respondent's business. Since the need for production capacity on short notice is an ongoing, foreseeable aspect of Respondent's business, it is by definition not an emergency situation of the type contemplated in *RBE Electronics.* I therefore find Respondent was not, at any time, excused from its bargaining obligation when it implemented and discontinued the evening shift in May, June, July, and August.

c. Existence of Economic Exigency

The complaint alleges five instances when Respondent implemented and discontinued the evening shift, and the issue is whether, at each point in time, there existed an economic exigency and if so, whether Respondent provided the union with notice and an opportunity to bargain.

(1) The May 9 implementation and discontinuation

In the first six months of 2002, the size of Respondent's pending workload ranged from 61,988 pages to 1,249,118 pages. The mean or average workload was 403,949 pages, and the median workload was 327,599. On May 3, the workload was 66,899 pages, and on May 10, the workload was 183,663. Thus, on both these dates, which bracket Respondent's first implementation of the evening shift, Respondent's workload fell far below the average and far

[5] There is no claim that the union engaged in delaying tactics during bargaining.

below the median. Indeed, the graph shows that this period was one Respondent's slowest. I conclude from this that there were no exigent circumstances in existence on May 9, and Respondent's implementation and discontinuation of the evening shift on that date, and its payment of a shift differential to employees on that date, constituted unlawful unilateral changes in violation of Section 8(a)(5) and (1) of the Act.

(2) The June 18 implementation

The second implementation of the evening shift was on June 18. Respondent's statistics show that on June 14, the workload was 603,085 pages, and on June 21, it was 1,128,913 pages, well above the mean and median workloads. Roberts testified that on Friday, June 14, he received an unexpected customer order for over 200,000 pages to be delivered by Friday, June 21, and a review of Respondent's production statistics shows this was an unusually brief turnaround period. I therefore find this was an economic exigency created by customer demand over which Roberts had no control.[6] The question, then, is whether Respondent provided adequate notice to the union of its need to implement the evening shift and a meaningful opportunity to bargain.

Respondent received the customer order at 4:00 p.m. on a Friday afternoon. On the following Monday, at 3:27 p.m. Roberts faxed a letter to the union stating that the company was experiencing "a busy time" and would be implementing the evening shift. Roberts did not say when the shift would be implemented and he did not inform Bruns that he had, at that point, less than five working days to generate and deliver over 200,000 printed pages. Instead, Roberts gave Bruns every indication that this was a routine situation. He suggested Bruns contact him in writing, "because this occurs frequently throughout the year." I find Roberts was misleading in this communication and his misrepresentation yielded a predictable consequence. Having no way to discern that time was of the essence, Bruns did not respond to Roberts' letter until the next afternoon, after the evening shift had been implemented. What constitutes sufficient notice depends on all the circumstances of a case, *Emhart Industries,* 297 NLRB 215, 216 (1989), and in these circumstances, I find Respondent did not provide the union with adequate notice or a meaningful opportunity to bargain. The implementation of the evening shift on June 18, and the payment of a shift differential to employees, were therefore unlawful unilateral changes in violation of Section 8(a)(5) and (1) of the Act.

(3) The July 25 discontinuation

By July 25, the economic exigency that existed on June 18 had long been resolved. Respondent's discontinuation of the evening shift on that date, and its discontinuation of the payment of the shift differential to employees, were unlawful unilateral changes in violation of Section 8(a)(5) and (1) of the Act.

[6] It bears repeating that my findings are based solely on the evidence before me. It may well be that Respondent was faced with an economic exigency on June 14 because it was no longer operating the second shift on a permanent basis, and had it been operating a steady second shift, it would have had the resources to meet this particular customer demand. The issue of the lawfulness of the discontinuation of the permanent second shift after the union was certified in 1999 is not before me, and no evidence was introduced regarding the circumstances of that decision. I therefore must assume the decision was lawfully made. Should the Board in the future decide otherwise, my findings here would obviously be impacted.

(4) The August 12 implementation

No evidence was adduced regarding the economic circumstances that have existed since Respondent's implementation of the evening shift on August 12. I therefore find Respondent's implementation of the evening shift on August 12, and its continued operation of that shift since that date, violates Section 8(a)(5) and (1) of the Act.

4. The waiver issue

Respondent argues that the union waived its right to bargain about the issue of the evening shift when Bruns stated on May 21 that he would not file an unfair labor practice charge over Respondent's one-day implementation on May 9. Respondent's argument ignores the fact that Bruns immediately went on to say that the union was not waiving its right to bargain about this issue. Respondent's argument merits no further discussion.

B. The allegations of direct dealing

The evidence establishes two instances of Respondent's dealing directly with employees. The first was when Respondent hired employee Jones on May 7 and dealt directly with him in assigning him to the evening shift and paying him the shift differential. The second instance was in June when two of Respondent's supervisors spoke directly to employee Shelburne about his assignment to the evening shift and the payment to him of the shift differential.

It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1). *Allied-Signal,* 307 NLRB 752, 753 (1992). Respondent had an obligation to deal with the union regarding Jones and Shelburne's assignment to the second shift and the payment to them of the shift differential. By dealing directly with these employees regarding the terms and conditions of their employment, Respondent violated Section 8(a)(5) and (1) of the Act.

C. The day shift

Roberts testified that since 1991, Respondent has had a past practice of dealing directly with employees when they request changes in their work hours for personal reasons, and of accommodating those requests whenever possible. This testimony stands uncontradicted on this record. Bruns testified he had no knowledge on the subject, and none of the three employees who testified were asked about it, including Napoli who, as a 13-year employee, may well have been conversant on the subject. I therefore find that Respondent had an established practice of dealing directly with employees, and of unilaterally modifying employee work schedules, in these limited circumstances. Respondent's discussions with employee Boudreaux in September, and its accommodation of his request to modify his hours on the day shift for personal reasons, therefore did not constitute direct dealing or a unilateral change in working conditions. See, *The Post-Tribune Co.,* 337 NLRB No. 192, sl. op. at p. 2 (2002) (where an employer's action does not change existing conditions the employer does not violate the Act). I recommend that the allegations of the complaint relating to this incident be dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit of employees is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

   All production and maintenance employees employed by Respondent at its 940 Harmsted Court, St. Charles, Missouri facility, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

4. The union is the exclusive representative of the employees in the unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. 5. On or about May 7, 2002, Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with an employee, who was represented by the union, regarding his wages and work hours on the evening shift.

6. On or about May 9, 2002, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing and then discontinuing an evening shift, and by unilaterally paying and then ceasing to pay a shift differential to employees.

7. In June 2002, Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with an employee, who was represented by the union, regarding his wages and work hours on the evening shift.

8. From on or about June 18 to July 25, 2002, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing and operating an evening shift, and by unilaterally paying employees a shift differential.

9. On or about July 25, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing the evening shift, and by unilaterally ceasing to pay employees a shift differential.

10. Since on or about August 12, 2002, Respondent has violated Section 8(a)(5) and (1) of the Act by implementing and operating an evening shift, and by unilaterally paying employees a shift differential.

11. Respondent did not violate the Act when it accommodated an employee request for a change in his work hours on the day shift.

12. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In addition to traditional remedial relief, the General Counsel requests three additional remedies: costs associated with this litigation including attorneys' fees, a requirement that Respondent's highest ranking official read the Board's notice to employees, and a broad cease and desist order. None of these remedies are warranted.

The General Counsel's argues that "by failing to pay heed to the [ALJ's] findings in the previously litigated case" Respondent is responsible for the costs of litigating this case. This is an argument that is as unusual as it is meritless. The parties filed exceptions to Judge Pulcini's decision and those exceptions are pending before the Board. The findings of an administrative law judge that are pending exceptions before the Board are not binding authority as the General Counsel well knows. *St. Vincent Medical Center,* 338 NLRB No. 130 (2003), and the case cited by the General Counsel, which deals with an employer's repeated failure to comply with settlement agreements, is entirely inapposite.

The General Counsel has repeatedly made the claim that Respondent's allegation of misconduct on the part of counsel for the General counsel was "frivolous" and by merely interposing the defense, Respondent should be sanctioned. As stated previously, the reason for my dismissing Respondent's first affirmative defense was because no evidence was adduced at the hearing in support of the defense. It was not dismissed because it was frivolous on its face. To the contrary, allegations of Board agent misconduct, although not substantiated in this case, are serious matters.

Nor is there any basis for a broad order in this case, or for the extraordinary remedy of compelling Respondent's highest ranking official to read the notice to employees. The General Counsel argues that Respondent has a "flippant approach to its responsibilities under the Act." This is not a basis for a broad order or for extraordinary relief. Respondent has never been found by the Board to have violated the Act, nor has Respondent ever failed to abide by the terms of a settlement agreement. The Board's traditional remedies are appropriate and adequate. Therefore, Respondent, on request, must rescind the operation of the evening shift and must, on request, rescind the payment of the shift differential to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Northwest Graphics, Inc., St. Charles, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Refusing to meet and bargain with Local 6-505M, Graphic Communications International Union, AFL-CIO, as the exclusive representative of its

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its 940 Harmsted Court, St. Charles, Missouri facility, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

(b) Unilaterally implementing or discontinuing the evening shift, unilaterally paying and then ceasing to pay a shift differential to employees, or unilaterally changing any other term or condition of employment, without reaching a good-faith impasse in bargaining;

(c) Dealing directly with employees regarding their wages and work hours on the evening shift, or any other term or condition of employment;

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the union as the exclusive representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, rescind the operation of the evening shift and, on request, rescind the payment of a shift differential to employees;

(c) Within 14 days after service by the Region, post at its St. Charles, Missouri facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 2002.

[8] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

Margaret M. Kern
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to meet and bargain with Local 6-505M, Graphic Communications International Union, AFL-CIO, as the exclusive representative of our employees in the following appropriate unit:

All production and maintenance employees employed at 940 Harmsted Court, St. Charles, Missouri facility, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally implement or discontinue the evening shift, unilaterally pay you or stop paying you a shift differential, or unilaterally change any other term or condition of your employment, without reaching a good-faith impasse in bargaining.

WE WILL NOT deal directly with you regarding your wages and work hours on the evening shift, or any other term or condition of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Local 6-505M, Graphic Communications International Union, AFL-CIO, and put in writing and sign any agreement reached on terms and conditions of employment for you.

WE WILL, on request, rescind the operation of the evening shift and WE WILL, on request, rescind the payment to you of a shift differential.

NORTHWEST GRAPHICS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829

(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.